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7 IN RE: CATHODE RAY TUBE (CRT)  
8 ANTITRUST LITIGATION

MDL No. 1917

Case No. C-07-5944 JST

9 This Order Relates To:

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11 **ORDER DENYING MOTION IN  
ALL DIRECT ACTION PLAINTIFFS**

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13 Defendants have filed a Joint Motion to Exclude Certain Expert Testimony of Professor  
14 Kenneth Elzinga. ECF No. 3174 (“Elzinga Mot.”). The motion is fully briefed. See ECF Nos.  
15 3404 (“Elzinga Opp’n.”), 3522 (“Elzinga Reply”). The Court denies the motion.

16 Professor Elzinga, an economist, submitted two reports in connection with this case. See  
17 ECF No. 3173-6 at 5-224 (“Elzinga Report”), 226-388 (“Elzinga Rebuttal”). Defendants seek to  
18 exclude some portion of pages 79-151 of the Elzinga Report and of pages 37-62 of the Elzinga  
19 Rebuttal.<sup>1</sup> Defendants argue that the challenged pages (1) reflect a narrative of the facts divorced  
20 from expert analysis, (2) contain improper opinions consisting of legal conclusions, and (3) offer  
21 improper opinion as to subjective intent, motive, or state of mind. Id. at 7-13, Elzinga Reply at 1-  
22 11.

23 As a preliminary matter, the expert report is hearsay, and therefore inadmissible. E.g.,  
24 Arizona, Dep’t of Law, Civil Rights Div. v. ASARCO, L.L.C., 844 F. Supp. 2d 957, 965 (D. Ariz.

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26 <sup>1</sup> Precisely which portions they seek to exclude is unclear: in the body of the motion, Defendants  
27 ask the Court to “preclude Professor Elzinga from presenting a narrative at trial, inferences about  
the existence of ‘agreements,’ and inferences about Defendants’ motive and intent.” ECF No.  
28 3174 at 21. Presumably, this is something less than all of the cited portions of Professor Elzinga’s  
report. Without further guidance, however, the Court proceeds to decide the motion as though it is  
directed to all of the cited portions.

1 2011), aff'd sub nom. Arizona v. Asarco LLC, 543 F. App'x 702 (9th Cir. 2013), adhered to on  
2 reh'g en banc, 773 F.3d 1050 (9th Cir. 2014), and aff'd sub nom. Arizona v. ASARCO LLC, 773  
3 F.3d 1050 (9th Cir. 2014). Thus, the jury is unlikely to see the document itself in the absence of a  
4 stipulation. If Professor Elzinga wants to relate his opinions or the basis of them to the jury, he  
5 will have to do so from the witness stand.

6 Turning to the substance of Professor Elzinga's report, his opinions generally are as  
7 follows:

8 (1) Conditions in the CRT industry (including a high combined market share,  
9 impediments to entry, and a small elasticity of supply) would be conducive to the effective  
operation of a conspiracy to fix prices;

10 (2) The Defendants and co-conspirators behaved in a manner that is consistent  
11 with the operation of a cartel and inconsistent with non-cooperative oligopolistic  
competition; and

12 (3) Based on the economic evidence and CRT industry conditions, he would  
13 expect the conspirators could effectively raise tube prices.

14 ECF No. 3403-4 at 9 (summarizing opinions).

15 The "narrative" to which Defendants object is a recitation of the facts Professor Elzinga  
16 has gathered from the evidence. He bases his expert opinions on these facts, and he is entitled to  
17 assume the truth of these facts in giving his opinions. If Plaintiffs fail to prove those facts,  
18 Defendants may comment on that failure to the jury and urge it to reject Dr. Elzinga's opinions as  
19 not supported by the evidence. Moreover, "[e]conomists often explain whether conduct is  
20 indicative of collusion. For example, courts have held that an expert is permitted to testify that the  
21 'climate' of a specific market was consistent with a conspiracy." U.S. Info. Sys., Inc. v. Int'l Bhd.  
22 of Elec. Workers Local Union No. 3, AFL-CIO, 313 F. Supp. 2d 213, 240 (S.D.N.Y. 2004) (citing  
23 In re Polypropylene Carpet Antitrust Litigation, 93 F. Supp. 2d 1348, 1355 (N.D. Ga. 2000)  
24 (denying in part defendants' motion to exclude plaintiffs' expert testimony because the expert's  
25 proposed testimony "that the climate of the polypropylene market during the relevant time period  
26 was consistent with a finding that Defendants engaged in a conspiracy to fix prices" would be  
27 "helpful to the trier of fact") and Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1003, 1010-  
28 11 (6th Cir. 1999) (expert economist, after describing conditions in respective markets,

1 opportunities for collusion, evidence pointing to collusion, terms of certain undisputed  
2 agreements, and market behavior, expressed opinion that there was concert of action consistent  
3 with plaintiff's conspiracy theory)). That is what Professor Elzinga is doing here.

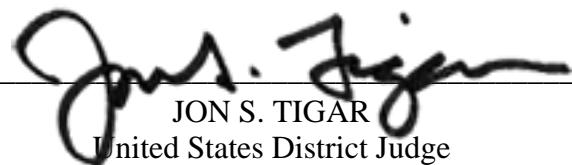
4 With regard to Defendants' concern that Professor Elzinga strays into expressing improper  
5 legal conclusions, "Rule 704(a) [of the Federal Rules of Evidence] states that opinion testimony is  
6 not objectionable on the grounds it embraces an ultimate issue in the case." Charles Alan Wright  
7 & Victor Gold, 29 Fed. Prac. & Proc. Evid. § 6284 (2d ed. 2016). "That said, 'an expert witness  
8 cannot give an opinion as to her *legal conclusion*, i.e., an opinion on an ultimate issue of law.'" Hangarter v. Provident Life & Acc. Ins. Co., 373 F.3d 998, 1016 (9th Cir. 2004) (quotation  
9 omitted). And "while there is the fine line between a permissible conclusion as to an ultimate  
10 issue of fact and an impermissible legal conclusion," In re Air Disaster at Lockerbie Scotland on  
11 Dec. 21, 1988, 37 F.3d 804, 827 (2d Cir. 1994), here the line should not be difficult to draw.  
12 Professor Elzinga will be permitted to testify that both Defendants' conduct and market conditions  
13 were consistent with a conspiracy to fix the prices of cathode ray tubes. He will not be allowed to  
14 testify that Defendants actually reached an agreement, or make statements about the subjective  
15 state of mind of Defendants' employees and agents.

## 17 CONCLUSION

18 For the foregoing reasons, Defendants' Joint Motion to Exclude Certain Expert Testimony  
19 of Professor Kenneth Elzinga is denied.

20 IT IS SO ORDERED.

21 Dated: October 25, 2016



22 JON S. TIGAR  
23 United States District Judge

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